84-252

NO.

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1984

ANN SHAVERS,

Petitioner

v.

WALTER E. HELLER & COMPANY,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF
APPEALS FOR THE FIFTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

The questions presented for review are:

1. May a judgment be certified as final under Rule 54(b) of the Federal Rules of Civil Procedure against ONE defaulting defendant in a fraud and conspiracy case involving allegations of joint liability among multiple defendants where the remaining defendants have answered, contest liability, and may prevail on the merits, i.e., where the song is conspiracy, doesn't it still take two to tango under Frow v. De La Vega, 15 Wall. 552, 82 U.S. 552, 21 L. Ed. 60 (1872); or may one now dance alone under Rule 54(b)?

2. Does erroneous certification under Rule 54(b) of an otherwise interlocutory matter confer appellate jurisdiction in the absence of an express certification under 28 U.S.C. Section 1292(b), i.e., should "no just reason for delay" be

expanded in its meaning to "involve a controlling question of law to which there is substantial ground for difference of opinion and that an immediate appeal . . . may materially advance the ultimate termination of the litigation," or do the certificates serve distinctly different purposes?

PARTIES TO THE PROCEEDINGS

This is an action arising from an amended complaint for civil damages originating in United States District Court for the Northern District of Texas. The petitioner, ANN SHAVERS, was added as an additional party defendant to the amended complaint. Other defendants are: TYGER EQUIPMENT-INTERNATIONAL, INC., a Texas corporation, TYGER PUMP SERVICES, INC., a related Texas corporation, TED Y. HATCH, chairman and chief executive officer of the aforesaid "TYGER" corporations, and in his capacity as an individual doing business under the names TYGER QUIP OPERATIONS and B&H PROPERTIES. Additional defendants are: HERCULES CONCRETE PUMPS, INC., a Mississippi corporation which has been in Title 11 bankruptcy proceedings since May 24, 1983, at which time H. S. STANLEY, JR., was appointed as Trustee of the property of the corporation, and JOHN

SHAVERS, president of HERCULES CONCRETE PUMPS, INC., and husband of the petitioner. The plaintiff in the proceedings below and respondent herein is WALTER E. HELLER & COMPANY, a Delaware corporation.

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OPINIONS OF LOWER COURTS

1. "WALTER E. HELLER & COMPANY v. TYGER EQUIPMENT-INTERNATIONAL, INC., ET AL.," No. CA3-83-0253-C (D.C. Tex. Sept. 15,

1983) (order denying Ann Shavers' motion to set aside default judgment) (the opinions, orders, findings of fact, judgment, and other actions taken by the United States District Court pertinent to the issues raised in this petition for certiorari appear as Appendices C, D, E, F, and I).

2. "WALTER E. HELLER & COMPANY v. TYGER EQUIPMENT-INTERNATIONAL, INC., ET AL.," No. 83-1683 (5th Cir. April 19, 1984) (petition for rehearing and suggestion for rehearing en banc denied per curiam, May 16, 1984).

JURISDICTION

The judgment of the court of appeals was entered on April 19, 1984. Timely petition for rehearing and suggestion for rehearing en banc was filed, and was denied on May 16, 1984. This Court has jurisdiction under 28 U.S.C. Section 1254

(1) to review the actions of the district court and the court of appeals, including the finality of the district court judgment and, therefore, its appealability.

STATUTES AND RULES INVOLVED

This case involves those federal statutes and procedural rules governing the entry of default judgments, the certification of such judgments as final in multiple defendant actions, and whether such judgments possess the requisite finality as to be appealable prior to the determination of the merits as to the remaining defendants. Fed. R. Civ. P. 54(a) and (b) (Appendix K); Fed. R. Civ. P. 60(b) (Appendix M); 28 U.S.C. § 1292(b) (Appendix L).

STATEMENT OF THE CASE

On September 15, 1983, the district court denied the motion of petitioner,

Ann Shavers, to set aside a $2,500,000 default judgment entered against her. The default judgment had been entered on July 1, 1983, when she was not represented by counsel and had made no appearance in the case. Petitioner had been added to an existing complaint in which the plaintiff had sought relief against a number of other defendants seeking civil damages for alleged fraud and conspiracy in certain heavy equipment leasing transactions. Petitioner was the only defaulting party in this multiple defendant action which remains pending, with liability being contested by the remaining defendants. Despite the necessarily joint nature of the liability arising from the alleged fraud and conspiracy scheme (Appendix J), the district court entered the default judgment awarding treble damages and certified it as final pursuant to Rule 54(b) of the Federal Rules of Civil Procedure

(Appendix D). Mrs. Shavers sought relief from the judgment pursuant to Rule 60(b) (Appendix G), which the district court denied on September 15, 1983 (Appendix C).

Mrs. Shavers timely appealed the denial of relief from the default judgment to the United States Court of Appeals for the Fifth Circuit. In her appeal, she raised a number of challenges to the validity of the default judgment, including abuse of discretion by the trial court. More significantly, however, she directly challenged the character of the judgment below, contending that it was not a "judgment" within the meaning of Rule 54(a) of the Federal Rules of Civil Procedure, and therefore not subject to certification under Rule 54(b) of the Federal Rules of Civil Procedure. She contends that where a single defendant defaults in a multi-defendant fraud and conspiracy case, a final judgment may not

be entered against the defaulting defendant until the liability of the contesting defendants has been established. She specifically raised the issue of finality of the judgment and therefore the court of appeals' jurisdiction, urging the court of appeals to dismiss the appeal on that basis, thereby "decertifying" the erroneously certified default judgment. Strangely, the opinion of the court of appeals and the per curiam opinion denying the petition for rehearing and suggestion for rehearing en banc are silent with respect to this issue (Appendices A, B).[1]

The court of appeals, by its silence in responding to these jurisdictional inquiries, assumed jurisdiction by its action in affirming the district court. Petitioner, Mrs. Shavers, seeks review of the affirmance of the $2,500,000 default judgment certified as final as

against the petitioner alone, and seeks reversal of the district court certification.

DISTRICT COURT JURISDICTION

The district court's jurisdiction was based alternatively upon federal question jurisdiction, 28 U.S.C. Section 1331, and diversity of citizenship, 28 U.S.C. Section 1332.

REASONS FOR GRANTING THE WRIT

There are two reasons for granting certiorari. First, the court of appeals in affirming the district court action has completely departed from established judicial precedent of this Court as uniformly followed by the circuits for many years in erroneously permitting a default judgment to be made final against a single defaulting defendant in a multi-defendant fraud and conspiracy case where the litigation remains pending against the other defendants who are contesting liability.

Second, the court of appeals, in affirming the district court has erroneously sanctioned a device whereby district courts may make interlocutory matters appealable at will by certification under Rule 54(b) of the Federal Rules of Civil Procedure, even where the certification is erroneous and the action of the district court is not a "judgment" within the meaning of federal law. These issues, which shall be addressed separately, are special and important because the court of appeals has rendered a decision in conflict with the prior decision of other federal courts of appeal on the same matter, and the prior decision of this Court, and by permitting the judgment to stand has departed from the accepted and usual course of judicial proceedings in a manner requiring the intervention of this Court's supervisory power. Additionally, improper certification of otherwise interlocutory

matters involves an important question of federal law in which there is a split among the circuits, which has not been settled by this Court, but which should be. Petitioner now analyzes the issues separately.

1. JOINT LIABILITY REQUIRES JOINT ACTIVITY--IT TAKES TWO TO TANGO. The case presently before this Court bears marked similarity to a decision of this Court over 100 years ago. Frow v. De La Vega, 15 Wall. 552, 82 U.S. 552, 21 L. Ed. 60 (1872). As in Frow, a default judgment was entered against one of several defendants in a fraud and conspiracy case maintained by a single plaintiff against those defendants. Frow was one of eight defendants which the plaintiff alleged to have conspired to defraud him of title to a tract of land. Frow defaulted, but the other defendants contested the allegations, and in fact, while Frow's default was on

appeal, won their case on the merits. The complaint in Frow alleged a conspiracy by Frow and others to defraud the plaintiff. The charges in Frow were "joint" in nature just as they are in this case. One hundred and twelve years ago, this Court first formulated the rule that:

> [I]f the suit should be decided against the complainant on the merits, the bill will be dismissed as to all the defendants alike--the defaulter as well as the others. If it be decided in the complaintant's favor, he will then be entitled to a final decree against all. But a final decree on the merits against the defaulting defendant alone, pending the continuance of the cause, would be incongruous and illegal.

82 U.S. at 554.

Of course, Frow preceded the adoption of Rule 54 of the Federal Rules of Civil Procedure and its included definitions regarding what may be considered a "judgment" for appealability purposes, and the certification procedure in multi-party cases. Has the adoption of Rule 54

impliedly overruled Frow? If so, one may now conspire alone and the incongruous result complained of in Frow can now occur if the plaintiff fails on the merits as to the other defendants. Suppose the remaining defendants are successful in their defense. Suppose that if they are not successful in defending the claims in their entirety, they are successful in defeating the RICO allegations and avoid treble damages. Suppose the remaining defendants are successful in establishing that the damages to the plaintiff are not at all as large as that alleged in the complaint. There is no cogent reason why the plaintiff should be permitted a greater recovery against Mrs. Shavers merely because she technically defaulted if the plaintiff cannot prove its case as to liability, or the full extent of its damages as the litigation proceeds. Such windfalls are not just.

Reliance upon a 112-year old rule of law, even though it was founded upon reason, justice, and equity might be questionable, particularly in light of the changes in procedure arising from the adoption of Rule 54, were it not for its continued recognition in the federal trial and appellate courts of this country since the adoption. Those courts use Frow, Id., to breathe life into the rule in joint liability cases. See International Controls Corp. v. Vesco, 535 F.2d 742, 746-47 n. 4 (2d Cir. 1976); Redding & Co., Inc. v. Russwine Construction Corp., 463 F.2d 929, 933 (D.C. Cir. 1972); Exquisite Form Industries, Inc. v. Exquisite Fabrics of London, 378 F. Supp. 403, 416 n. 19 (S.D. N.Y. 1974); In re Uranium Antitrust Litigation, 473 F. Supp. 382 (N.D. Ill. 1979), 617 F.2d 1248 (7th Cir. 1980).

Further, leading annotators have not seen Rule 54 of the Federal Rules of Civil

Procedure as changing in any way the Frow decision. 10 C. Wright, A. Miller, M. Kane, Federal Practice & Procedure: Civil 2d § 2690 (1983). In fact, the Frow rule has been extended to include cases where liability is not joint, but in which there are closely related defenses, an issue not presently before this Court, but indicative of the continued vitality of the principle of law. Cuebas y Arredondo v. Cuevas y Arrendondo, 223 U.S. 376, 32 S. Ct. 277, 56 L. Ed. 476 (1912); U.S. for Use of Hudson v. Peerless Ins. Co., 374 F.2d 942 (4th Cir. 1967).

The language of Rule 54 gives credence to the continued vitality of this time-honored principle of law. (Appendix K). The action of the Court, no matter how it may be entitled or described is not a judgment unless it is a "final decision"[2] from which an appeal is permitted under 28 U.S.C. Section 1291, or is "any appeal-

able interlocutory order."[3] As a default judgment against one defendant in a multiple defendant action involving necessarily joint liability (one cannot conspire with one's self) lacks the requisite finality to be certifiable under Rule 54(b), the district court departed from established judicial precedent of this Court and the uniform decisions of the circuits. By undertaking to certify the default in blatant contravention of Frow, Id., and its progeny, the district court committed grave error which has been perpetuated by the affirmance in the court of appeals. Unreported decisions have precedental value in the Court of Appeals for the Fifth Circuit, Local Rule 47.5.3 expressly providing in pertinent part: "Unpublished opinions are precedent." By its conduct, the Fifth Circuit has parted company with all other circuits and trial courts having previously considered this issue.

It does not appear that this Court has addressed the rule of law in at least 72 years[4], if not 112 years.[5] In joint liability cases, particularly where allegations of fraud and conspiracy are being contested in pending litigation, the plaintiff should not be so easily afforded an astronomical treble damages windfall judgment of Two and One Half Million Dollars before it is even determined that the plaintiff can prove its case against the other defendants. The enforcement of this judgment will have obvious catastrophic impact which can be averted only by last resort to this Court.

2. IMPROPER CERTIFICATION DOES NOT CREATE APPELLATE JURISDICTION. This Court has recently held that where an important question of federal appellate jurisdiction is involved, and where conflicts have arisen among the circuits, certiorari will be granted to review the decision of the

court of appeals even where the court of appeals had no jurisdiction to review an interlocutory order from the district court. Tidewater Oil Co. v. United States, 409 U.S. 151, 93 S. Ct. 408, 34 L. Ed. 2d 375 (1972). Significantly, the case involved the federal civil antitrust statutes, which have served as the model for the civil RICO statutes upon which liability is predicated for the treble damages granted in this case. Further, even more recently this Court has reminded us that it is obliged, even on its own motion, to consider the jurisdiction of the court of appeals if a question exists. Liberty Mut. Ins. Co. v. Wetzel, 424 U.S. 737, 96 S. Ct. 1202, 47 L. Ed. 2d 435 (1976). This is such a case. Here, the petitioner has been forced to appeal an improperly certified "final judgment" in order to have the court of appeals decertify the judgment by dismissal for lack

of jurisdiction. Where, as here, the district court has abused its discretion in characterizing its action as a judgment when it is not, and certifying the "judgment" under Rule 54(b), the aggrieved party, particularly where a Two and One Half Million Dollar default judgment has been entered against her, can ill afford to simply ignore the judgment and appeal when it becomes final by virtue of termination of the proceedings as to the other parties in this multiple defendant action. Rather, she urged the court of appeals to note the lack of finality and appealability of the judgment, but it declined to do so. See n. 1. By asserting appellate jurisdiction without comment, the Fifth Circuit has compounded the error and has condoned the use of a procedural device, i.e., Rule 54(b) certification, to create finality and appellate jurisdiction where it does not

exist. District courts cannot certify as final that which is not final. Liberty Mut. Ins. Co. v. Wetzel, Id.; Spencer, White & Prentis, Inc. v. Pfizer, Inc., 498 F.2d 358 (2d Cir. 1974); Ryan v. Occidental Petroleum Corp., 577 F.2d 298 (5th Cir. 1978). See also n. 3.

As the district court lacked the ability to make a Rule 54(b) certification in this multiple defendant fraud and conspiracy case on the basis of a default judgment against one of the allegedly jointly liable defendants, for the first reason urged for granting certiorari, did the court of appeals consider that it had appellate jurisdiction of an otherwise interlocutory matter under 28 U.S.C. Section 1292(b)? This alternate jurisdictional theory was also advanced before the court of appeals,[6] although appellate jurisdiction is not discussed in the opinions below. (Appendix A, B).

Petitioner calls to the attention of this Court that making a Rule 54(b) certificate the equivalent of a Section 1292 (b) certificate involves a question of law which this Court has not directly addressed, although it has made certain implications in previous dicta, and further is a question of law which has been the source of considerable conflict a...ong the circuits. In DeMelo v. Woolsey Marine Industries, Inc., 677 F.2d 1030 n. 9 at 1034 (5th Cir. 1982), that circuit in dicta stated:

> We observe that the requirements of a section 1292(b) certificate are more stringent than those for a Rule 54(b) certificate in a case to which the rule is applicable. Particularly relevant in this connection is the requirement of section 1292(b) that the certified question be one of "law as to which there is a substantial ground for difference of opinion." As is noted in Wright, Miller, Cooper & Gressman, supra, § 3929, at 149:
>
> > "[I]f judgment has been entered under Rule 54(b) in circumstances that do

> not justify application of the rule, it is comparatively easy to conclude that the entry of a judgment should not of itself support appeal under the more demanding criteria of § 1292(b), absent an alternative finding of the recitals required by the statute." [Footnote omitted.]

Nevertheless, there is language in Liberty Mut. Ins. Co. v. Wetzel, 424 U.S. 737, 745, 96 S. Ct. 1202, 1207, 47 L. Ed. 2d 435, 442 (1976), intimating that a Rule 54(b) certificate might satisfy the requirements of section 1292(b). And, such a procedure was allowed in Bergstrom v. Sears, Roebuck And Co., 599 F.2d 62, 64 (8th Cir. 1979). Contrary decisions were rendered in Morrison-Knudsen Co., Inc. v. Archer, 655 F.2d 962, 966 (9th Cir. 1981), and West v. Capitol Fed. Sav. & Loan Ass'n, 558 F.2d 977, 982 (10th Cir. 1977). We need not here determine this issue, though we observe that, as above-stated, there are substantive considerations embraced in a section 1292(b) certificate which are not addressed by a certificate under the rule. Our point is simply that the opinions indicating that compliance with Rule 54(b) will satisfy section 1292(b) support our holding here, and that such holding is not contrary to those decisions which refuse to find a Rule 54(b) certificate sufficient to meet section 1292(b).

677 F.2d n. 9 at 1034.

In assuming jurisdiction in this case, the court of appeals has taken a position contrary to its published position, albeit in dicta, and contrary to other circuits. Uniformity among the circuits ought to be established considering the jurisdictional quagmire which has now developed. DeMelo, Id., suggests that the circuit court lacked jurisdiction of this appeal, but recognized that other circuits have held to the contrary. A resolution of this issue is an important question of federal law which ought to be decided so as to eliminate the divergent results among the courts of appeal. It is also important to petitioner because if she is correct, as she believes that Frow, Id., precludes the entry of a judgment, and should appellate jurisdiction have been declined because there was no judgment which could be made final, then the judgment should be decertified. On the other hand, if the district court

certification can be equated to Section 1292(b) certification, the appeal was interlocutory, and she should still be permitted to challenge the judgment on its merits (the Rule 60(b) challenge necessarily did not go to the merits) once the judgment becomes final as to the remaining defendants.

The better reasoned approach is to give meaning to the words of certification and to recognize that certification is far more than an exercise in mere formalism, and that the language of the rule and of the statute are different because they are intended to serve different purposes. Those cases holding that Section 1292(b) certification criteria is more demanding are the more persuasive authorities. Morrison-Knudsen Co. v. Archer, 655 F.2d 962 (9th Cir. 1981); West v. Capitol Fed. Savings & Loan Ass'n, 558 F.2d 977 (10th Cir. 1977); Hunt v.

Mobile Oil Corp., 410 F. Supp. 10 (D.C. N.Y. 1976), aff'd, 550 F.2d 68 (2d Cir. 1977), cert. denied, 434 U.S. 984, 98 S. Ct. 608, 54 L. Ed. 2d 477 (1977).

The instant case illustrates that even if the certificates are interchangeable in some cases, they are not in all cases. It should be remembered that the Rule 54(b) certificate in the case now before this Court was not granted at the request of the aggrieved party to resolve a controlling question of law, which would be the normal function of certification under the rule, but was done at the instance of the prevailing party for the purpose of creating finality to allegedly insure that assets are available to satisfy the judgment. No controlling question of law was contemplated in any manner whatsoever as a basis for certification under the rule. The certification made by the district court was not for the purpose of permit-

ting petitioner to appeal, it was for the purpose of forcing petitioner to appeal. There is no reason to believe and no basis by which one might infer that the plaintiff was remotely interested in placing at issue the question of whether its default judgment was final for appealability purposes. The opposing party should not have to seek alternative certification or have it impliedly granted in order to have the interlocutory matter decertified when the petitioner, as the opposing party, would prefer to bring her appeal later from a judgment on the merits after the liability of the remaining defendants has been determined.

Accordingly, in the context of this case, certification under the rule cannot be an appropriate substitute for certification under the statute and this important question of federal law should be so resolved.

CONCLUSION

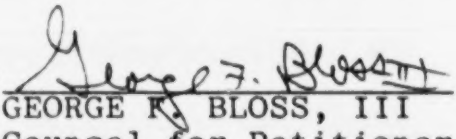
It has become in vogue for creditors to seek enforcement of default on obligations by using the strong-arm tactics of the threat of treble damages in civil RICO complaints, which were not designed or intended for the enforcement of civil obligations, even where they rise to the level of potential common law fraud. Recently, this abuse of civil RICO has reached monumental proportions. See Bankers Trust Co. v. Feldesman, 566 F. Supp. 1235 (S.D. N.Y. 1983). Not only has petitioner been deprived of her day in court in a treble damages Two and One Half Million Dollar default judgment entered against her, without determination of liability as to others who are alleged to be jointly liable and who are contesting their liability, but through erroneous characterization of the district court's action as a judgment certifiable as final,

and a usurpation of appellate jurisdiction, petitioner has also been denied the benefit of the potentially meritorious defenses of her co-defendants who may ultimately prevail upon the merits or succeed in avoiding treble damages or defeat substantial portions of the claimed damages. As this Court so aptly stated 112 years ago, "Such a state of things is unseemly and absurd, as well as unauthorized by law." Frow v. De La Vega, 15 Wall. 552, 82 U.S. 552, 21 L. Ed. 60 (1872). Petitioner has never asked for more than to simply have her day in court, and if she is not to be afforded this most fundamental of rights under our system of American jurisprudence, she should be afforded an ultimate resolution of this matter in a manner which is not incongruous and inconsistent with the remaining defendants. Throughout the proceedings below, petitioner has been denied the

benefit of even a single discretion. Where these denials rise to the level of disregard of the principles of finality and appealability and therefore the very jurisdiction of the Court, this Court should grant certiorari, intervene, and by exercising its supervisory powers, right this wrong.

Respectfully submitted,

ANN SHAVERS, Petitioner

BY: 
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[1]In her opening brief in the court of appeals, Mrs. Shavers immediately raised the jurisdictional problem in her "Statement of Jurisdiction," stating:

> [S]ince these "claims" involve concepts of liability necessarily dependent upon the liability of the others under alleged theories of fraud, conspiracy, and alleged violations of federal anti-racketeering statutes (RICO), Mrs. Shavers sharply disputes the finality of a default judgment entered against her alone with the litigation still pending against the remaining parties. See International Controls Corp. v. Vesco, 535 F.2d 742, 746-47 n. 4 (2nd Cir. 1976); Redding & Co., Inc. v. Russwine Construction Corp., 463 F.2d 929, 933 (D.C. Cir. 1972); Exquisite Form Industries, Inc. v. Exquisite Fabrics of London, 378 F. Supp. 403, 416 n. 19 (S.D. N.Y. 1974); In re Uranium Antitrust Litigation, 473 F. Supp. 382 (N.D. Ill. 1979), 617 F.2d 1248 (7th Cir. 1980); Frow v. De La Vega, 15 Wall. 552, 82 U.S. 552, 21 L. Ed. 60 (1872).

Brief for Appellant, p. 2.

The finality of the judgment was attacked throughout the body of her opening brief in the court of appeals (brief for appellant, pp. 23, 26-27, 44, and 47), again in her closing or reply brief (appellant's reply brief, pp. 3, 12-13, 21-22), and in her petition for rehearing and suggestion for rehearing en banc (petition for panel reh'g, pp. 2, 4-6, 14; sugg. for reh'g en banc, pp. iii-iv, 1, 6-10, 14). Recognizing that the briefs on appeal are ordinarily not a part of the record, these briefs nonetheless clearly indicate that a serious jurisdictional question was repeatedly

raised but was not addressed in the opinions of the court of appeals. Curiously, the appellee and respondent herein presented no argument or legal authorities whatsoever in opposition to Mrs. Shavers' argument that the district court action was not a certifiable judgment, and totally failed to address the issue in its brief. (Brief for Appellee).

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[2]Gillespie v. U. S. Steel Corp., 379 U.S. 148, 85 S. Ct. 308, 13 L. Ed. 2d 199 (1964); Brown Shoe Co. v. United States, 370 U.S. 294, 82 S. Ct. 1502, 8 L. Ed. 2d 510 (1962); Catlin v. United States, 324 U.S. 229, 65 S. Ct. 631, 89 L. Ed. 911 (1945).

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[3]The default judgment is not an injunction, does not involve receiverships, is not in a bankruptcy proceeding, admiralty, or patent infringement. Otherwise nonappealable interlocutory orders may not be made "judgments" by certification since a "district court cannot, in the exercise of its discretion, treat as 'final' that which is not 'final' within the meaning of Section 1291." Sears, Roebuck & Co. v. Mackey, 351 U.S. 427, 76 S. Ct. 895, 100 L. Ed. 1297 (1956) (emphasis by this Court); McKinney v. Gannett Co., 694 F.2d 1240 (10th Cir. 1982); Painton & Co. v. Bourns, Inc., 442 F.2d 216 (2d Cir. 1971); Haverhill Gazette Co. v. Union Leader Corp., 333 F.2d 798 (1st Cir. 1964), cert. denied, 379 U.S. 931, 85 S. Ct. 321, 13 L. Ed. 2d 343 (1964); Bush v. United Benefit Fire Ins. Co., 311 F.2d 893 (5th Cir. 1963); Stewart v. Shanahan, 277 F.2d 233 (8th Cir. 1960); Luria Bros. & Co. v. Rosenfeld, 244 F.2d 192 (9th Cir. 1957); Flanagan v. Northern Lumber Co., 222 F.2d 539 (2d Cir. 1955); Kuly v. White Motor Co., 174 F.2d 742 (6th Cir. 1949).

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[4]Cuebas y Arrendondo v. Cuevas y Arrendondo, 223 U.S. 376, 32 S. Ct. 277, 56 L. Ed. 476 (1912).

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[5]Frow v. De La Vega, 15 Wall. 552, 82 U.S. 552, 21 L. Ed. 60 (1872).

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[6]Petitioner, in her Reply Brief in the court of appeals, and particularly in her Suggestion for Rehearing En Banc, expressly questioned whether Rule 54(b) certification could substitute for certification under 28 U.S.C. Section 1292(b) when appealability was governed by the latter but certification had been made under the rule rather than the statute. The following is ver batim language from the Suggestion for Rehearing En Banc presenting the issue as framed before the court of appeals:

> Does appellate jurisdiction lie in this Court where the district court erroneously certified as final under Rule 54(b) of the Federal Rules of Civil Procedure a judgment which could not be made final, in the absence of an express certification under 28 U.S.C. Section 1292(b) of the otherwise interlocutory matter?

Sugg. for Reh'g En Banc, p. iv.

The issue was extensively briefed in the Suggestion for Rehearing, including direct quotation of the specific authorities now relied upon in this petition. Sugg. for Reh'g En Banc, pp. 8-10.

> The finality of the judgment, and therefore its appealability, necessarily hinges upon whether it is a judgment in the first place.

CERTIFICATE OF SERVICE

I, GEORGE F. BLOSS, III, counsel for petitioner, do hereby certify that I have deposited in the United States Post Office three (3) true and correct copies of the foregoing Petition for Certiorari, with first class postage prepaid, addressed to MARGARET L. VANDERVALK, Esq., of the firm of Akin, Gump, Strauss, Hauer & Feld, Attorneys of record for respondent, at their record mailing address of 2800 Republic Bank Dallas Building, Dallas, Texas 75201, being the only party required to be served, on this, the 10th day of AUGUST, A.D. 1984.

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